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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/785,570	02/24/2004	Rodney O. Nuckles	HO-P02734US1	9872

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EXAMINER

DONOVAN, MAUREEN C

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 02/09/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/785,570	Applicant(s) NUCKLES ET AL.	
	Examiner Maureen C Donovan	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 November 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. This action is responsive to communications: Amendment A filed 11/17/2004.
2. Claims 1-24 are pending.
3. The rejection to Claim 11 under U.S.C. 112 second paragraph is withdrawn in view of the amended claim.

Oath/Declaration

4. The examiner acknowledges that the rejection to the declaration made in the previous Office Action, in view of the current MPEP, was improper and the rejection is therefore withdrawn.

Claim Rejections - 35 USC § 112

5. Claim 22 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 22 recites the limitation "sauce". There is insufficient antecedent basis for this limitation in the claim.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 1,2,3,13,15,16,17,18,20,22 and 23 are rejected under 35 U.S.C. 102(b) as being anticipated by Pratl, US patent number 3,615,690.

Pratl discloses a process of preparing gelled food products wherein food materials and ingredients are prepared to form a food product, a gelling solution is prepared from a gelatin and water, the gelling solution is added to the food product and the food product and gelling solution are cooled (see Column 1, lines 34-54). Pratl discloses that the food product and gelling solution

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can be cooled in a mold (see Column 1, lines 34-54). Pratl discloses a gelling solution that is made from 30 pounds of water and 2.5 pounds of gelatin which would result in a gelatin weight percent of 8.3%, meeting the limitation of claim 3 (see Columns 2-3, Example 1). Pratl discloses that the 32.5 pounds of gelling solution is then added to 149.8125 pounds of food product, which yields a gelling solution weight percent of 17.8%, meeting the limitation of claim 22 (see Columns 2-3, Example 1). Pratl discloses removing the gelled food product from the mold following cooling (see Column 1, lines 63-65). This demolded gelled food product would inherently form a portion controlled food product, the portion being the size of the demolded food. The food materials as disclosed by Pratl include raw meat and the food product as disclosed by Pratl include foods that are considered to be encompassed by the claimed recitation of appetizers, for example a meat slice on a cracker (see Column 1, lines 34-75). Pratl discloses that the gelled food products should be refrigerated or frozen (see Column 2, lines 4-13) and that when heated the gelled food product melts at a temperature of about 100-110°F (see Column 2, lines 14-17). Pratl discloses a food product that is obtained by the process as described above, wherein the food product is considered to be a gel coated food product. Pratl discloses a method of preparing a gelled food product wherein the food product can be sliced at 32-40°F and then heated and removed from the heat (see Column 1, lines 63-71). Since Pratl discloses storing the product at a temperature of 0-10°F (see Column 2, line 9), it is interpreted that Pratl's disclosure of slicing the product for cooking at a higher temperature than it is stored at meets the claimed limitation of "thaw".

7. Claims 1,2,11,13,14,15,17,19,20 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Shaw, US patent number 4 196 219. The reference and rejection are incorporated as cited in the previous Office action mailed 29 July 2004.

Applicant's arguments filed 17 November 2004 have been fully considered but they are not persuasive. At pages 8 and 9 of the response, applicant states that nowhere does Shaw teach a method that involves enrobing or adding a gelling solution to a food product. This is not deemed persuasive for the reasons of record. It is interpreted that dipping a food product into a gelling

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solution is not distinguished in action from enrobing or adding a gelling solution to the food product. Applicant has argued that the process of Shaw is not enrobing or adding, however has provided no reasoning to explain how the reference differs from an enrobing or adding step. While the process as taught by Shaw may be different from the process as used by applicant, the claim language still encompasses the methods dipping. Further, applicant has not distinguished the claim language from the Shaw reference.

8. Claims 1,9,10 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Earle, US patent number 3 395 024 as evidenced by Leblang, online article publication. The reference and rejection are incorporated as cited in the previous Office action mailed 29 July 2004.

Applicant's arguments filed 17 November 2004 have been fully considered but they are not persuasive. At pages 10 and 11 of the response, applicant states that nowhere does Shaw teach a method that involves enrobing or adding a gelling solution to a food product. Additionally applicant states that Earle does not teach additional processing of the product after dipping. This is not deemed persuasive for the reasons of record. First, attention is directed to Column 7, line 10 of Earle wherein Earle discloses that the food product coated with the gelling solution is refrigerated. This is interpreted to meet the claim limitation of cooling the food product and gelling solution. Further, it is interpreted that dipping a food product into a gelling solution is not distinguished in action from enrobing or adding a gelling solution to the food product. Applicant has argued that the process of Earle is not enrobing or adding, however has provided no reasoning to explain how the reference differs from an enrobing or adding step. While the process as taught by Earle may be different from the process as used by applicant, the claim language still encompasses the methods dipping. Further, applicant has not distinguished the claim language from the Earle reference.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

9. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pratl as applied to claims 1,2,3,13,15,16,17,18,20,22 and 23 above.

Pratl discloses heating the gelled food product and applying the heated gelled food product as a sauce to other foods such as vegetables, fish products and casseroles (see Column 2, lines 42-45). Pratl does not disclose further heating of this composition of sauce and food.

It would have been obvious to one of ordinary skill in the art at the time of the invention to heat the combination of sauce and food if say the combination as a whole became cold during the serving and eating process and it was necessary to reheat the combination in order to serve a warm dish, reheating of food being a common step for one of ordinary skill in the art; or rather in order to properly heat the food product to which the sauce was added to.

9. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pratl as applied to claims 1,2,3,13,15,16,17,18,20,22 and 23 above, and further in view of Shaw.

Pratl discloses all the features of the instantly claimed invention except for using 0.05% carrageenan.

Shaw teaches coating meat products with carrageenan in order to extend the storage life of cooked foods. Shaw teaches that the coating can comprise from .025%-0.5% of carrageenan, and that amount is sufficient to protect the food against loss of moisture during frozen storage (see Column 2, lines 4-13 and Column 5, lines 43-65).

It would have been obvious to one of ordinary skill in the art at the time of the invention to add an amount of carrageenan within the range as taught by Shaw to the meat product of Pratl in order to further protect the meat product of Pratl from moisture loss during frozen storage, as Shaw teaches that this is a function of carrageenan.

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Applicant's arguments, see Amendment A, filed 17 November 2004, with respect to the rejection(s) of claim(s) 1,6,16,18,22,23 and 24 under Bienvenu and Shaw in view of Bienvenu and Mattson have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of the above references.

10. Claims 3-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shaw as applied to claims 1,2,11,13,14,15,17,19,20,21 and 23 above and further in view of Tye, US patent number 5 308 636. The reference and rejection are incorporated as cited in the previous Office action mailed 29 July 2004.

Applicant's arguments filed 17 November 2004 have been fully considered but they are not persuasive. Applicant's arguments concerning the rejections of Claims 3 and 5 under 35 U.S.C. 103(a) reflect the arguments' made against the rejection of Claims 1,2,11,13,14, 15,17,19,20 and 21 under 35 U.S.C. 102(b) over Shaw, therefore as the rejection of Claims 1,2,11,13,14, 15,17,19,20 and 21 under 35 U.S.C. 102(b) was maintained above, so is the rejection of Claims 3 and 5 under 35 U.S.C. 103(a).

11. Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shaw as applied to claims 1,2,7,8,11,13,14,15,17,20,21 and 23 above, and further in view of Hansson, US patent number 5 314 705. The reference and rejection are incorporated as cited in the previous Office action mailed 29 July 2004.

Applicant's arguments filed 17 November 2004 have been fully considered but they are not persuasive. Applicant's arguments concerning the rejections of Claims 7 and 8 under 35 U.S.C. 103(a) reflect the arguments' made against the rejection of Claims 1,2,11,13,14, 15,17,19,20 and 21 under 35 U.S.C. 102(b) over Shaw, therefore as the rejection of Claims

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1,2,11,13,14, 15,17,19,20 and 21 under 35 U.S.C. 102(b) was maintained above, so is the rejection of Claims 3 and 5 under 35 U.S.C. 103(a).

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

12. Claims 1,2,12,13,15,16,20 and 23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1,3,4,6,7,10,12,13,15,16,33,35,36,38,41,43,44,46,61 of copending Application No. 10/373122. Although the conflicting claims are not identical, they are not patentably distinct from each other because the process and product of Application No. 10/373122 encompass the process and product of the instant claims and it would be obvious to one of ordinary skill in the art that the scope of the instant application is encompassed by Application No. 10/373122.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD



**KEITH HENDRICKS
PRIMARY EXAMINER**